

<b>COMPLIANCE BOARD OPINION NO. 95-9</b>
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November 21, 1995

*Mr. George O. Kephart, Jr.*  
*Ms. Ellie Ahan*

The Open Meetings Compliance Board has considered your complaints that the Commissioners of Poolesville violated the Open Meetings Act by adopting, and seeking to enforce, a restriction on videotaping at open meetings. The restriction bars the videotaping of members of the audience who do not address the Commissioners. The Compliance Board has consolidated your complaints and responds to both of them in this opinion.

For the reasons set forth below, the Compliance Board finds that the restriction in question violates the Open Meetings Act.

**I**

**Nature of the Restriction**

The material facts are not disputed.<sup>1</sup> Since June 7, 1993, the Commissioners of Poolesville have had rules authorizing any member of the public to “photograph or videotape the proceedings of the Commissioners of Poolesville at an open meeting by means of any type of camera if the camera is operated from a position that does not block the view of any other person and does not create noise or light that disturbs members of the Commissioners of Poolesville or other persons attending the meeting.” Resolution No. 006-93, ¶3(b). The rules also dealt with disruptive conduct as follows: “A person attending an open meeting of the Commissioners of Poolesville may not engage in any conduct that disrupts the conduct of the meeting or interferes

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<sup>1</sup> There is a dispute over exactly what occurred at the Commissioners’ meeting on September 18, 1995, but the Compliance Board does not deem these matters to be material to the complaint.

with the opportunity of members of the public to observe and listen to the meeting.” ¶2(a).<sup>2</sup>

According to an affidavit submitted by Mr. Thomas B. Dillingham, Jr., President of the Commissioners of Poolesville, the town has interpreted the rule’s reference to “the proceedings of the Commissioners of Poolesville” to mean that a camera operator may record only the Commissioners themselves and those who address the Commissioners. “Such interpretation,” Mr. Dillingham pointed out, “precludes the audio or video taping of the non-participating audience at the town meetings of Poolesville.”

Mr. Kephart regularly videotapes open meetings of the Commissioners. Despite the town’s interpretation of the rule and efforts to persuade him to comply with it, Mr. Kephart maintains that he is entitled to focus his camera on members of the audience while videotaping the meetings. According to Mr. Dillingham, this practice has resulted in “numerous oral complaints” and one written complaint from residents of Poolesville.<sup>3</sup> However, there has evidently been no complaint that Mr. Kephart’s videotaping causes disruptive noise, light, or other physical interference with the orderly conduct of business.

In a letter dated June 28, 1995, Mr. Dillingham formally requested that Mr. Kephart’s videotaping “be confined solely and strictly to the members of the Boards and Commission at the meeting [you] are attending. If you continue to disregard this request, the Commission will propose amendments to its procedures which will strictly prohibit it.” At a meeting on September 18, the Commissioners sought to enforce their interpretation of the 1993 rules. Indeed, the police were called to enforce the restriction, but the meeting ended before the police arrived.

Finally, by resolution No. 009-95, effective on October 2, 1995, the Commissioners of Poolesville amended the rule allowing the photographing or videotaping of proceedings in an open meeting by adding the following explicit restriction:

However, no one, whether a private person or member of the media, may photograph or videotape those merely in attendance

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<sup>2</sup> Under ¶2(b) of the rules, “the presiding officer may order any person who engages in disruptive conduct to be removed from the session and may call upon the Montgomery County Police to enforce any such order.” The Compliance Board expresses no view on the role of the police in enforcing rules of this kind.

<sup>3</sup> The written complaint, from a Mr. George P. Deyo, Jr., dated March 7, 1995, noted that he “did not give my permission to be filmed or the tapes to be given out to anyone. I would very much like to know what I may be able to do about this matter if this cannot be handled by the Commissioners.”

at any Commissioners' meeting, it being the intent hereof that only the Commissioners and participants at the public hearing (at the speaker's podium) be the subject of such videotaping. Any person observed violating the foregoing may be deemed by the presiding officer to be disrupting the meeting, and may be ejected therefrom.

## II

### The Parties' Arguments

In his complaint, Mr. Kephart suggests that the right of private citizens to videotape "government in process" is a significant tool in holding public officials accountable. As quoted in the press, Mr. Kephart believes that the official record of a meeting does not always convey the full dimensions of the event: "By getting the sound and video, you get more. You see what the tone was. That's important." *Poolesville Gazette*, September 27, 1995, at 1. Ms. Ahan has raised similar concerns.

The Commissioners of Poolesville contend that their rule, as previously interpreted and now made explicit, reflects a proper effort to protect the privacy of persons who object to being filmed merely because they exercise their right to attend town meetings. "They have complained that they feel their rights are being chilled, and feel threatened and intimidated by Mr. Kephart's activities." This explanation of the basis of the restriction is set forth in a timely response to the Compliance Board on behalf of the Commissioners from Mr. Charles S. Rand, Esquire, Acting Town Attorney. In a legal analysis accompanying the response, Mr. Rand expresses the view that, because the restriction "has no [effect] on an individual's ability to videotape the actual proceedings before the Commissioners," it is consistent with the Open Meetings Act. In Mr. Rand's view, the restriction "is narrowly tailored" to respond to complaints "that Mr. Kephart's method of operating his video camera at meetings was having the effect of intimidating [members of the audience] and interfering with their right to attend such meetings without harassment."

## III

### Analysis

The Open Meetings Act requires each public body to "adopt and enforce reasonable rules regarding the conduct of persons attending its meetings and the videotaping, televising, photographing, broadcasting, or recording of its meetings." §10-507(b) of the State Government Article, Maryland Code.

Although this language stops short of a mandate that videotaping and the other specified activities be allowed, nevertheless it reflects an assumption that no public body would seek to ban these activities at an open meeting.<sup>4</sup> The Compliance Board believes that any attempt by a public body to prohibit videotaping at an open meeting would be unlawful. *See Peloquin v. Arsenault*, 616 N.Y.S.2d 716 (N.Y. Sup. Ct. 1994) (ban on videotaping inconsistent with New York's Sunshine Law). *See also Mitchell v. Board of Education*, 493 N.Y.S.2d 924 (N.Y. App. Div. 1985) (ban on audio taping unlawful).

The more difficult question is whether Poolesville's restriction, which is far from a flat prohibition, is a "reasonable rule." Like a Nebraska judge a century ago, the Compliance Board must acknowledge that "an attempt to give a specific meaning to the word 'reasonable' is trying to count what is not number, and measure what is not space." *Altshuler v. Coburn*, 57 N.W. 836 (Neb. 1894) (citation omitted). Despite its inherent imprecision, the term "reasonable" must be applied in a fair and principled way. In the Compliance Board's opinion, a rule restricting videotaping or other similar activities is "reasonable" only if it satisfies two criteria: (i) that the rule is needed to protect the legitimate rights of others at the meeting and (ii) that the rule does so by means that are consistent with the goals of the Act.

For example, a public body may surely restrict movement during a meeting by those filming the meeting. Such a rule responds to a legitimate claim of harm — that a camera operator moving about would distract participants and observers alike. Such a rule would also be consistent with the goals of the Act, which expressly allows the presiding officer of a public body to act against disruptive behavior.

By contrast, a rule does not meet the standard of reasonableness when it forbids a quiet, stationary camera operator from photographing members of the audience. The problem to which the Commissioners of Poolesville have responded — that some members of the audience at a public event do not wish to have their presence recorded on videotape — does not reflect a realistic or well-grounded claim of privacy. To the contrary:

Current technology subjects every person who happens to be in a public place to the possibility of having his or her picture

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<sup>4</sup> The "sunshine" laws of some states grant an express right to engage in videotaping and similar activities. *See* Pa. Stat Ann. tit. 65, §281 (construed in *Hain v. Board of School Directors*, 641 A.2d 661 (Pa. Cmwlth. 1994)). When the bill that was ultimately enacted as the revised Open Meetings Act was introduced, it contained a provision expressly granting such a right. *See* Proposed §10-507(b) in Senate Bill 170 of the 1991 Session. For unexplained reasons, the bill was amended in committee to its current language. The Act does contain a statement of legislative policy expressing approval of "[t]he ability of ... the media to ... broadcast meetings of public bodies ...." §10-501(b)(1).

taken. Newsworthy events and people are magnets for television news cameras and the still cameras of the print media. Because the recording and dissemination of newsworthy information is a matter of such high priority, the conclusion follows that persons who are in public or semi-public places and who are unexpectedly caught within the range of news cameras do not have a privacy interest that can prevail against the First Amendment informational interest .... The reporting of current events, by electronic and other means, would be significantly restricted if the law were otherwise.

*Cox v. Hatch*, 761 P.2d 556, 563 (Utah 1988). Anyone who watches television news is aware that the panning of the crowd is a standard element in a report on a public meeting. The size of the crowd, its composition, its expression — all these are an integral part of what any observer can see at any meeting open to the public. There is no right to be protected against the gaze of an observer in a public forum, or against the lens of the observer's camera.

In the opinion of the Compliance Board, the effort by the Commissioners of Poolesville to prevent Mr. Kephart from videotaping the audience at open meetings unreasonably restricts his prerogative to capture on tape the full context of the open meeting. Therefore, the restriction violates the Open Meetings Act.

OPEN MEETING COMPLIANCE BOARD

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